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ALEXANDER L. STEVAS,
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CASE NO. 83-223

in the

Supreme Court

of the

United States

OCTOBER TERM, 1982

JOHN DUGGAN,

Petitioner,

v.

THOMAS BERDIN,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Can a mayor fire a municipal employee in retaliation for the employee's speech and escape liability under 42 U.S.C. §1983 where the employee comments on a matter of public concern in response to a question from the mayor?

Petitioner incorrectly states at page i of his petition that the actions of Duggan "were admittedly performed in good faith." Petitioner cites to App. 13, but nothing on that page supports this contention. The findings of fact and conclusions of law announced by the trial court on January 28, 1980 point to the opposite conclusion (Record Vol. 12 p. 40) as does the trial court's award of punitive damages against Duggan.

Respondent contests the conclusion that his speech was a private expression. His words were spoken at a public baseball field, during working hours and at least 4 others were present when the respondent spoke (Record Vol. 8 pp. 104, 115-116 and Vol. 9 p. 172).

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STATEMENT OF THE CASE AND FACTS

Respondent supplements the petitioner's statement of the case and facts as follows. At the firing incident Berdin and two other men were setting trees around the Florida City baseball park (Record Vol. 12 p. 30). The trial court found that after the exchange described in Duggan's petition, Duggan went off to have a brief discussion with another individual, who was at the ballpark in a supervisory capacity, then came back, fired Berdin, and said: "Nobody tells me what to do." (Record Vol. 12 p. 31). One of the other workers described the incident as though Duggan was speaking to all three workers (Record Vol. 8 pp. 104, 115-116). As Duggan

described the incident, he and a superintendent walked up to where the three men were working, he addressed all three workers in the presence of the superintendent and Berdin responded. (Record Vol. 9 p. 172).

In the findings and conclusions announced on October 30, 1980 the Court found that the speech that caused Berdin to be fired was on a matter of public concern (Record Vol. 6 p. 6).

ARGUMENT

Connick v. Myers, ____ U.S. ____, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), is the most recent pronouncement in the area of protected speech and the discharge of public employees. *Connick* holds that a public employee cannot be discharged due to speech on a matter of public concern, but that public officials should enjoy wide latitude in managing their offices without oversight by the judiciary in the name of the First Amendment when employee expression cannot be fairly considered as relating to any matter of political, social or other concern of the community. 103 S.Ct. at 1690, 75 L.Ed.2d at 719. In the instant case the trial court finding that Berdin's speech did involve a matter of public concern and the Court of Appeals' affirmance of that finding make it clear that there is no conflict with *Connick*.

The U.S. Court of Appeals alluded, at footnote 8 of its opinion, to Berdin's speech "as ostensibly a private expression.", however the record reflects that the speech took place on a public baseball field, during working hours in broad daylight and in the presence of two other members of the city maintenance crew, Duggan and a supervisory employee of the city. The trial court which heard the testimony of 3 witnesses that there were at least 5 persons present when the speech took place made no finding that this was a private expression. The facts of this case show that it did not involve a private encounter as that term is used in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 412 (1979).

In another context this Court has defined private speech as that which the speaker seeks to preserve as

private and public speech as that which the speaker knowingly exposes to the public. *Katz v. United States*, 389 U.S. 347, 351 (1967). There are no facts in the record of this case to show that Berdin sought to preserve his speech to Duggan as private. The testimony at the trial indicates that Berdin knowingly exposed his speech to the public.

Givhan v. Western Line Consolidated School District, *supra*, concerned private encounters and private speech. The present case involves a public encounter and public speech. Because the facts and issues of the present case are different, Duggan cannot rely on *Givhan* to claim that the law, as it concerns the facts of the case at bar, was unsettled at the time he fired Berdin.

Cases decided prior to *Givhan v. Western Line Consolidated School District*, *supra*, granted protections to private expression that were at least equal to if not greater than those granted to public expression. *Griswold v. Connecticut*, 381 U.S. 479, 485-486 (1965), *Stanley v. Georgia*, 394 U.S. 557, 565 (1969), and *Katz v. United States*, *supra* at 351-352. Both *Board of Education v. Barnette*, 319 U.S. 624, 637 (1943) and *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), have held that the First Amendment protects the unspoken "individual freedom of mind." If the unspoken freedom of mind was protected by the First Amendment, then privately spoken words also fell within the Amendment's protection.

Berdin's speech to Duggan was in effect a petition to the City authorities on a matter of public concern. The First Amendment by its express terms guarantees the right to petition for a redress of grievances. This

right to petition extends to all departments of a state's government. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), and has been held to protect the sending of a telegram from a private citizen to a public official. *Bridges v. California*, 314 U.S. 252, 275-277 (1941). If a telegram petitioning a public official on a matter of public concern falls within the protection of the First Amendment, then there is no reason why Berdin's petition should not be accorded similar constitutional status.

According to the standard ennunciated in *Harlow v. Fitzgerald*, ____ U.S. ____, 102 S.Ct. 2727, 2739, 73 L.Ed.2d. 396, 411 (1982), a public official is not entitled to a qualified immunity if he knew or should have known that his conduct would violate statutory or constitutional rights. The First Amendment to the U.S. Constitution has been part of the law of this country since 1789. The rights protected by the First Amendment have been guaranteed against abridgment by state officials since at least 1925, *Gitlow v. New York*, 268 U.S. 652 (1925), and possibly since 1868 when the Fourteenth Amendment was ratified.

In *Weiman v. Updegraff*, 344 U.S. 183, 192 (1952), the court established that a public employee had a constitutional right not to be discharged on grounds that are patently arbitrary or discriminatory. *Keyishian v. Board of Regents of New York*, 385 U.S. 589, 605-606 (1967), held that public employment cannot be conditioned upon the surrender of First Amendment rights. In *Pickering v. Board of Education*, 391 U.S. 563, 574-575 (1968), the court ruled that a public employee's right to speak on issues of public importance may not furnish

the basis for his dismissal. Just two years before Duggan discharged Berdin the court stated that for at least a quarter of a century it had made clear that a state could not deny a benefit such as public employment on a basis that infringes upon a public employee's constitutionally protected interests in freedom of speech. *Perry v. Sinderman*, 408 U.S. 593, 597 (1972).

Based upon these precedents the decision of the Court of Appeals did not conflict with the decisions of this court in holding that Duggan should have known in 1974 that his conduct in firing Berdin was violative of Berdin's First Amendment rights.

CONCLUSION

This court should deny the petition for writ of certiorari on grounds that 1) the facts of this case involve public speech and thus there is no basis for claiming lack of clarity in the law based on a case involving private speech and 2) in 1974 Duggan should have known that he could not fire Berdin in retaliation for the exercise of his First Amendment rights.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFY that 3 copies of the Response to Petition for Writ of Certiorari ~~was~~ were furnished by mail to the following on this 9th day of September, 1983.

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